

REVERSE and REMAND; and Opinion Filed March 22, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-00506-CR

**THE STATE OF TEXAS, Appellant
V.
BROOKE SAMARA ISBELL, Appellee**

**On Appeal from the County Criminal Court No. 6
Dallas County, Texas
Trial Court Cause No. M14-51803**

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Schenck
Opinion by Justice Schenck

The State of Texas appeals the trial court’s order granting Brooke Samara Isbell’s motion to suppress evidence in her driving while intoxicated (“DWI”) case. In a single issue, the State claims the trial court erred in granting appellee’s motion because it applied the wrong legal standard to the facts. For the following reasons, we reverse and remand. Because the issues of law are well settled, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

After being charged with DWI, appellee challenged the legality of her warrantless stop by filing a motion to suppress several pieces of evidence, including “[a]ll tangible evidence seized” from her, “[a]ll statements . . . and other such actions” she made during and after the traffic stop, and the “[t]estimony of law enforcement officers . . . and all persons present at” the scene. The basis for her motion was the loss or destruction of a video recording of her stop.

At a hearing on the motion, the State called Dallas Police Department Officer Shane Johnson, the arresting officer, to testify about the stop, detention and arrest of appellee. Officer Johnson described appellee's arrest and what he remembered about her behavior that night. More particularly, he testified that on January 21, 2014 he was on patrol duty with his trainee, Officer Newsome. At approximately 3:10 a.m., while traveling southbound on Preston Road, Officer Johnson noticed a car traveling with its driver's door open. When the car turned from Belt Line Road onto Preston Road, he observed that the car's left tail light was not functioning. The officers then performed a traffic stop. Appellee was the driver of the car. After he approached the car, Officer Johnson detected the odor of alcohol coming from appellee. He asked appellee to exit her car so they could start a DWI investigation, but appellee refused to do so. Officer Johnson then placed her under arrest.

Officer Johnson also testified about the video of the arrest and Dallas Police Department procedures concerning video data. He testified to the following. As soon as an officer activates the overhead lights, a video recording begins. When the squad car returns to the station, the video data automatically uploads to a server via wireless technology. The officer does not need to do anything to trigger the upload. After a certain period of time, the data is automatically deleted. To preserve the data beyond the usual retention period, the officer has to fill out a form on the terminal in the squad car, which flags the data as evidence and marks it for non-deletion. Officer Johnson verified that Officer Newsome filled out the form correctly, so the data should have been saved for trial.

Nevertheless, the data was lost. Officer Johnson spoke with a supervisor at his station to see whether the data had been deleted by mistake, but the supervisor could find no record of the data whatsoever. Officer Johnson speculated that one of two things might have happened. First,

the officer responsible for marking the data for non-deletion might have made a clerical error. Or second, the upload might have failed altogether, so the data never reached the server.

The trial court granted appellee's motion to suppress. In granting the motion, the trial court found that the video evidence was most likely lost or destroyed as a result of negligence.

STANDARD OF REVIEW

We review a trial court's ruling on a motion to suppress for an abuse of discretion. *Johnson v. State*, 414 S.W.3d 184, 192 (Tex. Crim. App. 2013). We apply a bifurcated standard of review, giving almost complete deference to the trial court's determination of historical facts and mixed questions of law and fact that rely upon an assessment of the credibility and demeanor of a witness, but applying a de novo standard of review to pure questions of law and mixed questions that do not depend on credibility determinations. *Arguellez v. State*, 409 S.W.3d 657, 662 (Tex. Crim. App. 2013).

DISCUSSION

The key elements necessary in any suppression of evidence claim are: (1) there must be a suppression of the evidence by the prosecution after a request by the defense; (2) the evidence must be favorable to the accused; and (3) the evidence must be material. *Nastu v. State*, 589 S.W.2d 434, 441 (Tex. Crim. App. 1979), *cert. denied*, 447 U.S. 911 (1980). Nothing in the record before this Court indicates that the video recording, which was lost or destroyed, constituted evidence favorable to appellee. Consequently, there is no factual basis to support the granting of appellee's motion to suppress. *See Garrett v. State*, 682 S.W.2d 301, 309 (Tex. Crim. App. 1984), *cert. denied*, 471 U.S. 1009 (1985).

We next consider whether the loss or destruction of evidence in the State's custody constitutes a due process violation that would warrant the exclusion of evidence. Whether such a violation occurred, depends upon the type of evidence lost or destroyed. *Salazar v. State*, 298

S.W.3d 273, 277–78 (Tex. App.—Fort Worth 2009, pet. ref'd) (citing *Arizona v. Youngblood*, 488 U.S. 51, 57–58 (1988)). If the evidence lost or destroyed is material exculpatory evidence, the State commits a due process violation. *Id.* at 78. If the evidence is instead only potentially useful, then no such violation occurs, unless the State acted in bad faith. *Id.* It is the defendant's burden to show bad faith. *Id.* If the defendant fails to make such a showing, evidence should not be excluded. *Id.*

In this case, the subject of loss or destruction was the video recording of the traffic stop. Video recordings generally fall within the potentially useful category of evidence, rather than the material exculpatory class. *See Gamboa v. State*, 774 S.W.2d 111, 112 (Tex. App.—Fort Worth 1989, pet. ref'd). Therefore, appellee had to show the police acted in bad faith in failing to preserve the video recording to establish a due process violation. *See e.g., United States v. Montieth*, 662 F.3d 660, n.1(4th Cir. 2011) (destruction of videotape of police stop for suspicion of narcotics trafficking was not a violation of defendant's due process rights, as the destruction complied with a standard 90-day hold policy and was not in bad faith); *State v. Fuller*, No. 18994, 2002 WL 857671, at *2 (Ohio App. 2d Dist. April 26, 2002) (finding a videotape that did not validate the officer's story that the defendant threw marijuana out the window during a traffic stop, was merely potentially useful and not destroyed out of bad faith).

In this case, Officer Johnson was the only witness called to testify at the hearing of appellee's motion. He explained that he and his trainee followed Dallas Police Department policy to preserve the video data, they tested the equipment at the beginning of their shift, and they flagged the data for non-deletion. After that, the officers had no further control over the data. Officer Johnson speculated that the data was lost because of a clerical error or an equipment malfunction. The trial court found that the video tape was most likely lost or destroyed as a result of negligence. Negligence is not synonymous with bad faith. Bad faith

entails some sort of improper motive, such as personal animus against the defendant or a desire to prevent the defendant from obtaining evidence that might be useful. *Ex parte Napper*, 322 S.W.3d 202, 238 (Tex. Crim. App. 2010). Although the trial court included a finding that Officer Johnson could not provide credible testimony concerning some critical facts in dispute, to find bad faith, a finder of fact must do more than simply disbelieve proffered evidence. *Id.* There must be some evidence from which an inference of bad faith reasonably can be drawn. *Id.* None exists here.

Based upon the record before this Court, we find no evidence that would support a conclusion that the prosecutor, the police, or their agents acted in bad faith regarding the failure to preserve evidence. *See Tijerina v. State*, Nos. 05–03–01472–CR, 05–03–01475–CR, 05–03–01473–CR, 05–03–01476–CR, 05–03–01474–CR, 05–03–01477–CR, 2004 WL 2404535, at *7 (Tex. App.—Dallas Oct. 28, 2004, no pet.) (mem. op.). Indeed, the trial court made no such finding. We conclude the trial court abused its discretion in granting the motion to suppress because, by not requiring a showing of bad faith, it incorrectly applied the law to the facts in this case. Accordingly, we sustain the State’s sole issue.

CONCLUSION

We reverse the trial court’s order granting appellee’s motion to suppress evidence. We remand the cause for further proceedings consistent with this opinion.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

DO NOT PUBLISH
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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

THE STATE OF TEXAS, Appellant

No. 05-15-00506-CR V.

BROOKE SAMARA ISBELL, Appellee

On Appeal from the County Criminal Court

No. 6, Dallas County, Texas

Trial Court Cause No. M14-51803.

Opinion delivered by Justice Schenck.

Justices Bridges, and Lang-Miers
participating.

Based on the Court's opinion of this date, the judgment of the trial court is **REVERSED** and the cause **REMANDED** for further proceedings consistent with this opinion.

Judgment entered this 22nd day of March, 2016.